2000

Alma Glenn Pratt v. Board of Education of the Uintah County School District : Brief of Respondent

Utah Supreme Court

GLENN PRATT,

Plaintiff and Respondent,

vs.

Case No. 14469

BOARD OF EDUCATION OF THE UINTAH COUNTY SCHOOL DISTRICT,

Defendant and Appellant.

BRIEF OF RESPONDENT

An Appeal from the Judgment of the
Fourth Judicial District Court, Uintah County

The Honorable J. Robert Bullock, Judge

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action for breach of contract arising out of Appellant's failure to renew Respondent's contract of employment with it. Respondent seeks reinstatement as a teacher with Appellant and damages for breach of contract including all rights and benefits which he would have received had he not been improperly terminated by Appellant.

DISPOSITION IN LOWER COURT

This action was tried to a jury on December 10, 1975, at Vernal, Utah, before the Honorable J. Robert Bullock, Judge. By stipulation of the parties, the question presented to the jury was whether or not Respondent resigned his position of employment with Appellant. By Special Verdict, the jury found that Respondent had not resigned his position of employment. The Court entered judgment against Appellant on January 28, 1976 awarding Respondent $18,070.03 in damages and further ordered Appellant to reinstate Respondent as a teacher together with all rights and benefits he would have received had he not been terminated contrary to the terms of his contract of employment with Appellant.

RELIEF SOUGHT ON APPEAL

Respondent requests that the judgment of the District Court be affirmed.

STATEMENT OF FACTS

Respondent testified that he was employed at the Whiterocks School as a school teacher by Appellant for thirteen years from 1959-1973. (Tr. p. 28). At the time of trial, he was 54 years of age, married and had three children living at home. (Tr. pp. 26-27). He had no other occupation since becoming a school teacher. (Tr. p. 30).

Respondent testified that he had planned to teach another ten years. (Tr. p. 30).

During March, 1973, the Superintendent of Appellant met with Respondent and the other teachers at Whiterocks School in the Uintah District where the Respondent taught school. (Tr. pp. 27, 28 and 78). At that meeting, the Respondent and the other teachers were told that the school would be closed at the end of the school year and that if any of them desired to teach elsewhere, they should submit a letter of application for such other position. (Tr. pp. 33-34 and 78). However, Superintendent Evans admitted on cross-examination that it was the duty of the school district to hire tenured teachers teaching at the Whiterocks School in another school in the district. On or about April 1, 1973, Respondent sent a letter to Appellant requesting a teaching position at the Todd Elementary School in the Uintah District. (Tr. p. 32, Ex. 1).

Appellant states that certain events followed Respondent's letter requesting another teaching position with the District. Essentially, Mr. Ashel Evans, Superintendent of Appellant, maintains that Respondent resigned his position of employment at a meeting at which only the two of them were present. (See Appellant's Brief pp. 3-4). Respondent testified he did not resign. (Tr. pp. 35-37). Respondent further testified that

Superintendent Evans had advised him that since the District was closing the Whiterocks School, Respondent would have to apply for a job. Respondent replied that his position of employment was with the District and not just the school. Respondent then testified that Mr. Evans advised him: "Well, you have tenure at the school but not in the District." (Tr. p. 34). Superintendent Evans testified on direct examination that in late April or early May, 1973, Respondent advised him that he was resigning. Respondent denied that he ever resigned and the jury believed Respondent. Accordingly, this Court should accept the fact that Respondent did not resign his position of employment. Toomers Estate v. Union Pacific Railroad Co., 121 Utah 37, 239 P.2d 163 (1951); Lym v. Thompson, 112 Utah 24, 184 P.2d 667 (1947). Nevertheless, "Appellant proceeded to fill the vacancy left by Respondent's resignation." (Tr. p. 81).

On June 27, 1973, a letter was sent to Appellant by the Uintah Education Association requesting a hearing on behalf of the Respondent regarding his termination. On August 14, 1973, a second request was made for a hearing regarding the termination of Respondent A hearing was held September 5, 1973. (R. p. 145).

Superintendent Evans testified that the purpose of the hearing was to determine why Respondent had not had his contract renewed. (Tr. pp. 85-86). The minutes of the meeting of the Board show that when asked when the Board had decided to terminate Mr. Pratt, "Superintendent Evans stated that the Board had instructed him to advise all teachers at Whiterock that because the school was being closed all of their jobs were being terminated."

Part of the language of a valid contract between Respondent and Appellant provides in relevant part:

> Whenever, for any cause, it becomes necessary to decrease the number of tenured employees in the school district, the Board of Education may, at the close of the school year, release as many of such employees as may be necessary. Notice shall be given by the time contracts are issued. No tenured employee shall be dismissed under the provisions of this section while a nontenured employee is retained or employed to render a service which the tenured employee is certificated and competent to render. (Emphasis added). (R. p. 3).

The parties stipulated in the Pre-Trial Order that the Respondent was a "tenured employee." At trial, counsel for Appellant agreed that the Appellant did hire untenured teachers to teach positions Respondent was capable of teaching. (Tr. p. 74). Superintendent Evans also testified that new teachers were hired to teach in the District for the 1973-74 school year. (Tr. p. 91).

The sole question submitted to the jury was whether or not Respondent had resigned his position of employment with Appellant. The jury found that Respondent had not resigned. (R. p. 242).

Dan Turner, Clerk-Treasurer of the Uintah County School District, testified that he knew the salary and benefits Respondent would have received during the years for which Respondent claimed damages and that Respondent's salary and fringe benefits for 1974 would have been $6,710.71 (Respondent waived damages for the 1973 portion of the 1973-74 school year). (Tr. p. 98). Mr. Turner testified that Respondent's salary and fringe benefits for the 1974-75 school year would have been $13,373.84 and that those salary and benefit amounts would have been $6,156.09 from the beginning of the 1975-76 school year to the date of the trial (December 10, 1975).

Mr. Turner testified that Respondent's total salary and job related benefits would have totaled $26,240.50. (Tr. p. 98-99). At no time did counsel for Appellant object to the foregoing testimony of Mr. Turner.

Respondent testified that he had sought and taken other employment from 1973 through 1975. (Tr. pp. 38-39). He testified that his income for 1974 was $3,200.00 as shown by his Federal Tax Return, (Tr. p. 38, Ex. 3), and that his 1975 income was $4,970.50 as shown by his check stubs from his current employer. (Tr. p. 39, Ex. 4).

On cross-examination, counsel for Appellant asked Respondent whether or not he had applied for work with the Duchesne School District. (Tr. p. 46). Respondent replied that he had. (Tr. pp. 47-48). Counsel for Appellant did not ask Respondent what had come as a result of his application to the Duchesne School District nor did counsel pursue whether or not Respondent had made application for work elsewhere. With respect to Respondent's employment, the record shows as follows:

Q (BY MR. LYBBERT): You are presently employed by Turner Lumber, is that what I understand?

A Yes, sir.

Q And how long have you been employed there?

A Since January of '75.

MR. LYBBERT: I have no further questions at this time, Your Honor. (Tr. pp. 49-50).

The only other evidence in the record regarding Appellant's contention that damages should have been submitted to the jury appears in the testimony of Mr. Nash at Tr. 109 wherein Mr. Nash is being asked by Respondent's attorney as to portions of the minutes of a meeting of the Board of Education of the Uintah County School District held September 5, 1973. Those minutes state in part:

> Mr. Nash asked Mr. Pratt if he was working. Mr. Pratt replied that he was working at Turner Building Supply at Roosevelt. Mr. Nash asked Mr. Pratt if he had applied for a teaching position in another district. Mr. Pratt stated that he had applied to the Duchesne School District. He stated that they would only allow him six years teaching experience. He stated that this would require him to take a loss of income. Mr. Nash stated that the measure of damage that might be awarded him could be the difference between what he could have received with six years experience and what he could have received at the top of the salary schedule. (Tr. p. 109, Exhibit 12).

The Court held that there was no real issue as to damages and that damages were a matter of calculation, "there being no factual dispute it's strictly a matter of law" and that there was insufficient evidence for the question of mitigation to go to the jury. (Tr. p. 130). When asked whether there was any evidence, the jury could "fasten on" to reduce the amount of damages claimed by Respondent, counsel for Appellant replied: "There aren't dollars and cents figures that they can." (Tr. p. 133).

ARGUMENT

POINT I

RESPONDENT'S CLAIM IS NOT BARRED BY THE UTAH GOVERNMENTAL IMMUNITY ACT FOR THE REASON THAT:

A. THE UTAH ORDERLY SCHOOL TERMINATION PROCEDURES ACT, SECTIONS 53-51-1 ET SEQ., UTAH CODE ANNOTATED (SUPP. 1975) RENDERS THE PROCEDURES SET FORTH IN THE GOVERNMENTAL IMMUNITY ACT NONAPPLICABLE IN TEACHER TERMINATION CASES.

B. THE UTAH LEGISLATURE AMENDED THE GOVERNMENTAL IMMUNITY ACT TO PERMIT ACTIONS FOR BREACH OF CONTRACT AGAINST GOVERNMENTAL UNITS WITHOUT COMPLYING WITH SECTIONS 63-30-12, 63-30-13 AND 63-30-19 OF THAT ACT.

C. THE GOVERNMENTAL IMMUNITY ACT DOES NOT APPLY TO ACTIONS BROUGHT AGAINST SCHOOL DISTRICTS FOR BREACH OF CONTRACT.

A. THE UTAH ORDERLY SCHOOL TERMINATION PROCEDURES ACT, SECTIONS 53-51-1 ET SEQ., UTAH CODE ANNOTATED, (SUPP. 1975) RENDERS THE PROCEDURES SET FORTH IN THE GOVERNMENTAL IMMUNITY ACT NONAPPLICABLE IN TEACHER TERMINATION CASES.

Appellant argues that Respondent waive his claims under the Utah Orderly School Termination Procedures Act, Sections 53-51-1 et seq., (Supp. 1975) and cites a portion of the record in support of its contention. One June 10, 1974, Appellant had moved the lower court to dismiss Plaintiff's Complaint for the reason, among others, that "Plaintiff had failed to file Notice of his Claim in accordance with the provisions of Section 63-30-13, U.C.A. 1953, as amended." On November 19, 1975, the District Court ruled, "The Court is of the opinion that the Governmental Immunity Act is not applicable to this case, and upon that basis, Defendant's motion for summary judgment is denied." (R. p. 186).

As is more fully set forth below, the Utah Orderly School Termination Procedures Act sets forth an administrative procedure for terminating teachers which, Respondent submits supersedes the provisions of the Utah Governmental Immunity Act.

The school district complied with the procedural aspects of the Act in terminating Respondent when it granted him the hearing he requested. Accordingly, when counsel for Appellant asked whether or not Respondent was making a claim under the provisions of the Utah Orderly School Termination Procedures Act, counsel for Respondent replied he was not. (Tr. p. 2). Respondent's position is correct for two reasons. First, the question of whether or not the Utah Orderly School Termination Procedures Act modifies the provisions of the Utah Governmental Immunity Act with respect to Respondent's claim is a matter for the court to decide. The court had decided against Appellant's position. Therefore, the question as to the applicability of the Utah Orderly School Termination Procedures Act was not relevant to the jury trial. Second, the Appellant complied with the procedural requirements of the Utah Orderly School Termination Procedures Act. Therefore, Respondent submits that his withdrawal of his claim under the Utah Orderly School Termination Procedures Act was only for the purpose of the trial then scheduled. To the extent the Act waived the application of the Governmental Immunity Act, Respondent submits that his claim under the Utah Orderly School Termination Procedures Act is still relevant. Even if Respondent did error in withdrawing his claim, it is a harmless error. The question of whether or not the Act applied is for the Court to decide and therefore had no effect on the jury trial.

It is Respondent's position that the Utah Orderly School Termination Procedures Act sets forth certain administrative remedies inconsistent with the notice requirement of Section 63-30-12 of the Utah Governmental Immunity Act. Section 53-51-4 of the Utah Orderly School Termination Procedures Act requires in part that the:

> . . . board of education of each school district by contract with its educators or their associations or by resolution of the board shall establish procedures for termination of educators in an orderly manner without discrimination.

Section 53-51-5, Utah Code Annotated (Supp. 1975), provides that the orderly school termination procedures adopted by the district shall provide:

> (1) a right to a fair hearing.
>
> ****
>
> (4) at least one month prior to issuing notice of intent not to renew the contract of the individual, he shall be informed of the fact that continued employment is in question and the reasons therefor and given an opportunity to correct the defect which precipitated possible nonrenewal.
>
> (5) a written statement of causes
> (a) pursuant to which the contract of individuals may not be renewed . . . .

Sections 53-51-6 and 53-51-7 of the Utah Code set forth the procedures pursuant to which the "fair hearing" is to be conducted and specifically authorizes boards of education to establish procedures for conducting "fair hearings."

Appellant argues that on or about March 23, 1973, Superintendent Evans met with Respondent and other teachers at the Whiterocks School and advised them that the School would be closed "at the end of the school year and that if any of them desired to teach elsewhere in the District, they should inform the Appellant of their intent in writing." (Tr. p. 78).

Respondent submits that the Utah Orderly School Termination Procedures Act supersedes and renders not applicable those provisions of the Utah Governmental Immunity Act which provide for the filing of a claim before suit may be brought against the school district for the reason that the Utah Orderly School Termination Procedures Act specifically requires that school districts adopt procedures and afford teachers employed by them specific procedural rights and remedies which are different than those contemplated in the Utah Governmental Immunity Act.

For example, the Utah Orderly School Termination Procedures Act gives a teacher certain rights in the nature of job security and provides "procedural due process" for any teacher seeking redress for violation of the provisions of that Act. Specifically, the Act requires that the school district afford teachers a "fair hearing" (Section 53-51-5(1)) and further provides that school districts shall provide teachers with "written notice of suspension or final termination including findings of fact made by the board when such suspension or termination is for cause" (Section 53-51-5(9)). The Act further specifies the procedure pursuant to which the hearing shall be conducted (Section 53-51-6) and provides that hearing examiners may be appointed by the school district to conduct hearings involving the termination of teachers (Section 53-51-7).

It is clear that the Utah Orderly School Termination Procedures Act requires that the school district establish procedures and a timetable for hearing disputes involving the termination of teachers.

Considerable latitude is allowed school boards in establishing those procedures. In the instant case, it is difficult to determine precisely when Respondent's "claim" occurred. Appellant could argue that Respondent's claim occurred on March 23, 1973, when Superintendent Evans advised the teachers at Whiterocks that they would have to apply for other employment in the District. Respondent's claim could have also occurred in late March or early May of 1973 (when Superintendent Evans states that Respondent resigned) or that it occurred when "Appellant proceeded to fill the vacancy left by Respondent's resignation."

Respondent submits that the Utah Orderly School Termination Procedures Act specifically authorizes the school board to establish procedures for conducting a "fair hearing." Whatever may be the date on which Respondent's "claim" occurred, Appellant set the date for Respondent's "fair hearing" at a time considerably after the ninety day period permitted by the Utah Governmental Immunity Act which Appellant urges on this Court. By its own action, the school board may defeat the legitimate claim of a tenured school teacher by delaying an administrative remedy under the Utah Orderly School Termination Procedures Act beyond the 90 day filing period provided in the Governmental Immunity Act.

Furthermore, Section 53-51-7, Utah Code Annotated, (Supp. 1975) provides in part:

> . . . nothing herein shall be construed to limit the right of either the board or the educator to appeal to an appropriate court of law.

Respondent submits that the procedures set forth in the Utah Orderly School Termination Procedures Act are clearly inconsistent with the Utah Governmental Immunity Act and would allow school boards to defeat the intention of the Utah Orderly School Termination Procedures Act by delaying the "fair hearing" until long after the ninety day period afforded in the Utah Governmental Immunity Act had run.

Respondent further submits that the principal purpose of the requirement that claims be presented or filed within a short period of time is to provide units of government with full information as to the rights asserted against it and to enable the local unit of government to make proper investigation concerning the merit of the claim and to settle those claims having merit without the expense of litigation. 17 McQuillin, Municipal Corporations, Section 48.02 at page 60.

> Statutory . . . provisions requiring presentation of claims or demands to municipal corporations or counties before an action is instituted are in furtherance of the public policy to prevent needless litigation and to save unnecessary expenses and costs by affording an opportunity amicably to adjust all claims before suit is brought. The purpose of provisions requiring notice or statements of claims as a condition precedent to instituting a suit for damage against a municipal corporation is to give municipal authorities prompt notice of the injury and the surrounding circumstances in order that the matter may be investigated while the matter is fresh, witnesses available, and before conditions have changed materially, and that the liability of the municipality or the extent of liability may be determined. 56 Am. Jur. 2d Municipal Corporations, § 686, citing cases including Sweet v. Salt Lake City, 43 Utah 306, 134 P. 1169 (1913), 52 ALR 2d 966.

In the instant case, the Utah Orderly School Termination Procedures Act specifically reverses the requirements set forth in the Utah Governmental Immunity Act in that a school district which terminates "a tenured teacher" must give notice to the teacher of its intention to terminate him together with the specific reasons therefor. The Utah Governmental Immunity Act requires that the injured party state with specificity the basis upon which he asserts a claim against the governmental entity.

Respondent submits that procedural provisions of the Utah Orderly School Termination Procedures Act are inconsistent with the procedures of the Utah Governmental Immunity Act. The Utah Governmental Immunity Act was enacted in 1965 by the Utah Legislature. The Utah Orderly School Termination Procedures Act was enacted by the Utah Legislature in 1973. The later act affording rights and requiring procedures different than the earlier act necessarily prevails over the earlier act. West Beverage Co. of Provo v. Hansen, 98 Utah 332, 96 P.2d 1105 (1940).

Where two legislative acts are repugnant to, or in conflict with each other, the last one passed, being the latest expression of the legislative will, will, although it contains no repealing provisions, govern, control or prevail so as to supersede and repeal the earlier act to the extent of the repugnancy. Bullen v. Anderson, 81 Utah 151, 17 P.2d 213 (1932); 82 CJS, Statutes, Section 294, p. 489. If the enforcement of an earlier statute would thwart the purposes of a later one, the courts will resort to the doctrine of repeal by implication. State ex rel. Medford and Pear Co. v. Fowler, 207 Ore. 182, 295 P.2d 167 (1955).

B. THE UTAH LEGISLATURE AMENDED THE GOVERNMENTAL IMMUNITY ACT TO PERMIT ACTIONS FOR BREACH OF CONTRACT AGAINST GOVERNMENTAL UNITS WITHOUT COMPLYING WITH SECTIONS 63-30-12, 63-30-13 AND 63-30-19 OF THAT ACT.

The Utah Governmental Immunity Act at Section 63-30-5, Utah Code Annotated (Supp. 1975) provides:

> Immunity from suit of all governmental entities is waived as to any contractual obligation and actions arising out of contractual rights or obligations shall not be subject to the requirements of sections 63-30-12, 63-30-13 or 63-30-19 of this act. (1975 Amendment underlined).

The 1975 Session of the Utah Legislature specifically permitted actions against governmental entities arising out of contractual rights or obligations to be brought without the filing of a notice of claim.

Respondent submits that the action of the 1975 Legislature is relevant to his case even though his claim occurred some time during 1973. The amendment to the Utah Governmental Immunity Act was a remedial statute relating only to the procedure by which Respondent could secure his rights under the Utah Orderly School Termination Procedures Act. As such, the amendment may properly be construed to operate retrospectively and applies to this action.

. . . remedial or procedural statutes which do not create, enlarge, diminish, or destroy contractual or vested rights but relate only to remedies or modes of procedure are not within the general rule against retrospective operation but are generally held to operate retrospectively. Such statutes will not be given retrospective operation if to do so would impair contractual obligation or severe vested rights, unless the language of the statute indicates that such is the legislative intent.

While it has been held that a remedial statute will not be given retrospective or retroactive operation unless the legislative intent appears on the face of the statute, expressly, by plain and positive language, or by necessary implication, the rule that, unless the language of the statute so requires, the statute shoudd not be given retrospective or retroactive operation has been held not to apply to purely remedial laws, unless an intent to the contrary is shown; and a remedial statute is to be construed to give affect to the purpose for which it was enacted, and, the reason of the statute extends to the past transactions as well as those in the future, it will be so applied, although it does not, in terms, so direct, unless to do so would impair some vested right or violate some constitutional guarantee. 82 CJS Statutes, § 614; (see also 82 CJS Statutes, § 421.

It is the general rule that provisions added by amendment affecting substantive rights are intended to operate prospectively only and that provisions added by amendment affecting substantive rights will not operate retrospectively unless the legislature has expressly stated its intent or such intent is fairly implied by the language of the amendment or by the circumstances surrounding its enactment that the amendment operate retrospectively. McCarrey v. Utah State Teachers Retirement Board, 111 Utah 251, 177 P.2d 725 (1947); Oakland Construction Co. v. Industrial Commission, 520 P.2d 208 (1974); Sands, Sutherland Statutory Construction, p. 200, Section 22.36 (4th Ed.).

However, in the absence of a savings clause, or statute or some other clear indication that the legislative intent is to the contrary, provisions added by amendment which affect procedural rights or legal remedies are construed to apply to all cases pending at the time of its enactment and all those commenced subsequent thereto, whether the substantive rights sought to be enforced thereby accrued prior or subsequent to the amendment unless a vested right would be thereby impaired. Sands, Sutherland Statutory Construction, p. 200, Section 22.36 (4th Ed.).

The construction of remedial statutes requires great liberality and whenever meaning is doubtful, it should be construed to extend the remedy. Contractual Casualty Co. v. Phoenix Construction Co., 46 C.2d 423, 296 P.2d 108, 51 ALR2d 914 (1956).

In Tellier v. Edwards, 56 Wash.2d 652, 354 P.2d 925 (1960), the court held that a remedial statute has retroactive application when it relates to practice, procedure or remedies and does not affect a substantive or vested right. Accord, Beneficial Management Corp. of America, 85 Wash.2d 637, 583 P.2d 510 (1957).

Respondent submits that the filing of a notice required in the Utah Governmental Immunity Act is merely jurisdictional barring the court from considering actions against the State and its political subdivisions. As the notice requirement no longer applies to actions arising out of contract, the bar to the jurisdiction of the court has been waived by the Legislature. Notwithstanding the fact that the cause of action arose before the subject amendment to the Utah Governmental Immunity Act, the lower court had jurisdiction to hear this action even though

Respondent did not file the notice, because the action arose out of a breach of contract.

Although there is authority to the contrary, Respondent submits:

> . . . where clearly intended, or in the absence of an intent to the contrary, a statute conferring jurisdiction may operate to give jurisdiction over causes of action arising before the passage of the act. 82 CJS, Statutes, Section 423.

C. THE GOVERNMENTAL IMMUNITY ACT DOES NOT APPLY TO ACTIONS BROUGHT AGAINST SCHOOL DISTRICTS FOR BREACH OF CONTRACT.

This cause of action against the Appellant is not governed by the language of the Utah Governmental Immunity Act. Section 63-30-2(5) defines "claim" as:

> . . . any claim brought against a governmental entity or its employees as permitted by this Act. (Emphasis added).

Section 53-4-8, Utah Code Annotated, (1953), found in the Revised Statutes of Utah, 1898, provides in relevant part:

> Said boards (of education) . . . may sue and be sued . . . .

It is clear from the language of Section 53-4-8 that, if Respondent ever had governmental immunity, such immunity was waived in 1898 and not in 1965 when the Utah Governmental Immunity Act became effective.

Section 53-4-8 specifically authorized suits against Appellant. Accordingly, Respondent's action for breach of contract against the Appellant is not governed by the provisions of the Utah Governmental Immunity Act.

For any of the foregoing reasons, Respondent need not comply with the notice requirement of the Utah Governmental Immunity Act.

POINT II

THE LOWER COURT CORRECTLY ORDERED APPELLANT TO PAY DAMAGES AND TO REINSTATE RESPONDENT IN ITS EMPLOYMENT.

In this cause of action, Respondent sought both damages and reinstatement. Appellant does not question the authority of the court to award damages (if the action is properly before the court), but does question the propriety of the court ordering Respondent reinstated. An affirmative injunction ordering a party to perform under the provisions of a contract will be treated as an order of specific performance. Specific performance of a contract will be given as a substitute for the remedy of damages where the legal remedy is inadequate or impractical. Specific performance will be ordered to prevent the travesty of justice involved in permitting

parties to refuse the performance of their contracts at their pleasure while electing to pay adequate damages for the breach. 71 AmJur 2d, Specific Performance, Section 1.

In order to grant a prayer for specific performance of a contract, the remedy afforded at law must be as plain, adequate, competent and efficient as the remedy of specific performance and not insufficient or doubtful. Halloran-Judge Trust Co. v. Heath, 70 Utah 124, 258 P. 342 (1927), 64 ALR 368.

Appellant argues that Respondent had an adequate remedy at law for the prospective breach of his employment contract with Appellant and that Appellant is therefore precluded from injunctive relief. Respondent submits that he had no adequate remedy for prospective breach for the reason that his claim to such damages would have been speculative and uncertain. B.T. Moran v. First Security Corp., 82 Utah2d 316, 24 P.2d 384 (1933).

Counsel for Appellant admitted that there were no dollar and cent figures in this case. (Tr. p. 133). Furthermore, Appellant's reliance on the Halloran case, supra, is not well founded. In Genola Town v. Santaquin City, 96 Utah 88, 80 P. 2d 930 (1938),

reh. den. 96 Utah 104, 85 P.2d (1938), Genola sought an order of the court compelling Santaquin to provide it with water pursuant to the terms of a written agreement. One of the terms of the written agreement conditioned Santaquin's performance upon receiving federal funds to assist in the construction of the project. Santaquin argued that the contract was not enforceable for want of mutuality for the reason that it, at its sole discretion, could have defeated the contract by not applying for federal funds. The court held at 96 Utah 96-97:

> Such is the case with many contracts whose binding effect depends on a condition precedent, the carrying out of which condition precedent lies within the power of only one of the parties to the contract. Th rule regarding mutuality of obligation as making the contract amenable to specific performance is more honored by than by obedience to the rule. The doctrine of mutuality has gone through the course of most legal developments. Great legal minds have fashioned the law from the staff of life by applying a solution which fits the justice of the actual case. . . .
>
> The old doctrine of mutuality of remedy is a concrete example of a rule which has been so eroded by necessary exceptions as to leave it more of a vestige than a substantiality.
>
> ****
>
> Specific performance is granted by equity when it is plain that the party should and can perform and refuses to do so, an injustice not remedial by a monetary judgment would otherwise result. The doctrine that at the time of making the contract there must be mutual fixed obligations is not tenable.

> If the contract itself provides for a preliminary period definite or indefinite in which it is to be determined whether a condition precedent which will make the contract binding will take place and before withdrawal of the obligor of the contract, it becomes bilateral by performance of the condition precedent, equity may under the rule above laid down decrease specific performance in order to do justice or prevent injustice, as if the contract from the beginning had been bilateral.

In Utah Mercur Gold Mining Co. v. Herschel Gold Mining Co., 103 Utah 249, 134 P.2d 1094 (1943), the defendants argued that plaintiff's prayer for specific performance should not be granted because the plaintiff had refused to perform under the provisions of the agreement and the court did not compel them to do so. The court held at 301 Utah 255-256:

> We see no merit in the court refusing to grant specific performance to the petitioner where he has performed his part simply because the respondent might not or could not obtain his specific performance if the shoe had been on the other foot. It is very difficult to see why a person who refuses to perform where the other has performed may stand up in court and say: "even though he has done what the contract required of him and I have not, you should not make me perform because if he had not performed and I had performed or tendered performance, I could not obtain the remedy of specific performance." The remedy of one should not depend upon the hypothetical case of what the other could demand if the situation were different.

In the instant case, Respondent tendered his offer to perform at the Todd School. In reliance upon his contract of employment with Appellant, he stood ready to perform. Appellant cites 22 ALR2d 508 in support of the proposition that mutuality of remedy is essential to granting specific performance. Respondent submits that 22 ALR2d 508 may be cited on any proposition regarding the doctrine of mutuality of remedy for the reason that the purpose of the citation is:

> . . . to examine in this annotation the history and the juridical basis of the mutuality rule in general, note the principal authorities concerning it, suggest the proper form of it, and review the general case law and substance of the whole subject.

Respondent submits that review of the cases cited in 22 ALR2d 508 and the cases cited subsequent thereto clearly demonstrate a movement by the courts away from the requirement of mutuality before specific performance will be ordered by the courts.

Appellant cites Corbin on Contracts, Vol. 5A, §1204 (1951 and supplement), to advance three reasons why specific performance should not be ordered.

The first argument is that the decree would be difficult to enforce. That would be true only if the court were ordering Respondent to perform in a workmanlike manner or to the best of his abilities. In the instant case, the court is merely ordering Appellant to reinstate Respondent as a school teacher. This is not an action which would require the continuous supervision of the Court. In the instant case, Respondent seeks an order of this Court ordering Appellant to reinstate him as a teacher employed by Appellant. If, in the future, Appellant has grounds to terminate Respondent, it may so do.

Second, Appellant suggests that involuntary servitude is somehow involved in this matter. Involuntary servitude would be involved if the Court were being asked to order Respondent to render a service. In this instance, Respondent has asked the Court to order the Appellant to re-employ him. If, it is Appellant's contention that it is being placed in a position of "involuntary servitude" because of the Court's order requiring it to reinstate Respondent, the argument is inapplicable as the Fourteenth Amendment to the Constitution of the United States prohibiting "involuntary servitude" applies only to natural individuals, and not to political subdivisions.

Third, Appellant argues that it fosters a "continuing undesirable relationship between employer and employee." In this case, Appellant has never argued that there was an undesirable relationship. Appellant has maintained that Respondent quit his position. The jury did not believe Appellant. If an "undesirable relationship" exists, it is because of the manner in which Appellant has treated Respondent. Appellant should not be able to assert its own wrongdoing as a basis for refusing to re-employ Respondent.

In School District No. 6 of Pima County v. Barber, 85 Ariz. 95, 332 P.2d 496 (1958), the court held that a teacher whose contract of employment would have automatically been renewed unless a written notice of dismissal was given on or before a certain date, and that notice was not given, was entitled to reinstatement.

In Matteson v. State Board of Education, 57 C.A.2d 991, 136 P.2d 120 (1943), the court held that where the state commission on credentials illegaly refused to renew the credentials of a school teacher, and the local board acted illegaly in dismissing the teacher, the teacher was entitled to be restored to her position with full salary from the date of dismissal.

In Mass v. Board of Education of San Francisco Unified School District, 61 C.2d 612, 394 P.2d 579 (1964), the court held

that a teacher is entitled to reinstatement with full salary and benefits from the date of suspension where the local board of education suspended the teacher on charges which the local board failed to establish.

In Thayer v. Anacortes School District, 81 Wash.2d 709, 504 P.2d 1130 (1972), it concerned the nonrenewal of a teacher/librarian whose contract with the school district was not renewed allegedly because of a lack of funds necessitating a reduction in certificated personnel. The teacher was the senior librarian. The court held that the teacher would be entitled to reinstatement and reasonable damages if she could show that librarians with less seniority were retained. Accord, Lines v. Yakima Public School System, Yakima School District No. 7, 533 P.2d 104 (Wash. App. 1975).

The foregoing cases cited by Respondent hold that reinstatement is a proper remedy where there is a violation of a statutory right or a contractual right. Were reinstatement not a proper remedy for the Respondent, the statutory requirements of the Utah Orderly School Termination Procedures Act could be effectively avoided by any school district. For example, a school district could notify a teacher during February or March of any year that the teacher was to be terminated. A hearing could be held on or before June of the same year. Thereafter, the teacher would have to resort to court action. If the court hearing were held prior to the commencement of the following school year, the school teacher's sole remedy would be for a prospective lost salary. Under those circumstances, it is difficult to imagine how the injured school teacher would satisfy the trier of fact that his monetary damages would be substantial. Were reinstatement not afforded school teachers whose statutory rights have been violated, provisions of the Utah Orderly School Termination Procedures Act could be effectively nullified by school district action.

POINT III

THE EXISTENCE OF RESPONDENT'S CONTRACT OF EMPLOYMENT AND ITS TERMS WERE AGREED BY THE PARTIES.

Appellant claims that the "contract language relating to preference status in hiring was never received as evidence and was thus never available for the judge or jury to consider. (Tr. pp. 58, 114). During the trial, counsel for Respondent asked Mr. Turner, Clerk-Treasurer of Appellant, to identify what was offered as Exhibit 11. Counsel for Appellant objected in the following language:

> MR. LYBBERT: I will not stipulate to this, Your Honor, because I have not seen the manner in which this is formulated and they are comparing it with that. And perhaps at recess we can get copies of that and submit it.
>
> MR. DIBBLEE: All right. Excellent.
>
> THE COURT: All right. We'll reserve a ruling on your offer until he's had an opportunity to examine it further. (Tr. p. 58).

Apparently, counsel for Respondent felt no obligation to examine it further and the record shows that Exhibit 11 was not offered during the course of trial. However, after the jury was excused, counsel for Appellant argued that the case should be dismissed as to Appellant for the reason that Respondent had failed to show he had a contract. (Tr. pp. 134, 136).

Appellant's entire defense at trial was that Respondent had voluntarily resigned and that therefore the district had no contractual obligation to rehire the Respondent in succeeding years. At page 74 of the Transcript, counsel for Respondent is asking Dale Harrison, Principal at the Whiterocks School at the time the Appellant failed to renew Respondent's contract of employment about the number of years teachers had been employed at Whiterocks. At that point, the record shows as follows:

MR. LYBBERT: If Your Honor please, I think this is immaterial. I don't think there's any issue in this.

MR. DIBBLEE: Well, do you admit then that the school did hire non-tenured personnel in jobs that Mr. Pratt would have been qualified to do.

MR. LYBBERT: Absolutely.

THE COURT: I think that is so. The record will show, Ladies and Gentlement, that there isn't any question now, counsel have stipulated and agreed that the School District did hire untenured people after his employment ended that Mr. Pratt was capable of performing. There isn't any question about that. (Tr. p. 74).

Moreover, counsel for Appellant in his opening statement to the jury stated as follows:

> I agree with Mr. Dibblee that this is not a complicated case. As I see it, the essential issue is whether or not Mr. Pratt advised Mr. Evans in the spring of '73 that he didn't wish to have his contract renewed with the district. That's the case. (Tr. p. 22).

Counsel for Appellant did not object to the court's summary of counsel's stipulation. When a party concedes a fact, declares or stipulates to the existence of a fact material to the cause of his adversary, no proof is thereafter required. Butler v. Stratton, 95 C.A.2d 23, 212 P.2d 43 (1949). A party who causes the court to understand that certain facts are admitted cannot object to the hearing being conducted on the basis of that understanding. Sundgren v. Sundgren, 363 P.2d 853 (Okla. 1961); 88 CJS, Trials, Section 58. Evidence need not be introduced to prove a fact admitted by the adverse party or conceded by the adverse party. 88 CJS, Trials, Section 58.

Where the party not having the burden of proof admits by counsel in open court, the facts on which the claim of the opposing party rests, such judicial admission releases the party having the burden of proof from aducing evidence to prove such facts and bars the opposing party from disputing them and the party having the burden of proof is entitled to instructions directing the jury to take the admitted facts as positively settled. Hogsett v. Smith, 229 S.W.2d 20 (Mo. App. 1950).

Where a party admits in open court the existence of a fact material to the cause of the adversary, no proof is thereafter required for a finding on the matter so confessed, and a party who causes a judge to understand that certain facts are admitted cannot object to the judge's conducting the trial on the basis of that understanding. 88 CJS, Trial, Section 58.

Respondent submits that counsel for Appellant did not keep his representation to the Court that he would examine Respondent's Exhibit 11 and "at recess . . . get copies of that and submit it." Appellant's brief at page 2 concedes that "Respondent is a tenured school teacher . . . ." Appellant's brief sets forth in some detail its side of the case arguing that Respondent had resigned. The jury did not believe Appellant's evidence, and instead chose to believe the evidence presented by Respondent. Appellant tried the case on the theory that it need not honor the provisions of its contract of employment with Respondent for the reason that Respondent had resigned his position of employment. Appellant should not now be allowed to assert error based upon its failure to keep its representations to the Court regarding the provisions of the contract or because it mislead the Court as to whether or not the provisions of the contract were still an issue.

POINT IV

THE LOWER COURT CORRECTLY DETERMINED THAT THE ISSUE OF DAMAGES SHOULD BE COMPUTED AS A MATTER OF LAW.

Point III of Appellant's Brief advances the novel proposition that not only is it the duty of a party claiming damages to show the amount of damages suffered by him, but it is also his duty "to show that he has made a reasonable effort to seek other remunerative employment and mitigate his damages." (Tr. p. 149). Appellant correctly cites Kartchner v. Horne, 1 Utah 2d 112, 262 P. 2d 749 (1953), for the proposition that it is the Respondent's burden to produce evidence showing his damages. In the instant case, Respondent testified that he had sought and had obtained employment with Turner Lumber Company. He testified as to his salary and produced his tax returns for the 1974 tax year and further produced his check stubs from his employer for the 1975 tax year. Thereafter, Mr. Turner, Clerk-Treasurer of Appellant, was called and testified as to the salary and benefits Respondent would have received had he continued his employment with Appellant. Counsel for Appellant did not cross-examine Respondent with respect to his efforts to find employment and concludes in his statement of facts, "In the summer of 1973, the Respondent applied

for a teaching position with the Duchesne County School District. (Tr. pp. 46, 47). Apparently, Respondent was not given an offer of employment by the Duchesne District . . . ." (Appellant's Brief p.4 Having failed to cross-examine Respondent, Appellant now argues the novel proposition that it "was not required to present rebuttal or to cross-examine the witnesses in this respect." (Appellant's Brief p. 19). Apparently, Appellant urges this Court to adopt the rule that it is the burden of the Respondent to show he attempted to mitigate his damages.

Generally speaking, the party who would lose if no evidence were presented as to an issue regarding damages is charged with the burden of proving that issue. 22 Am Jur2d, Damages, Section 291. Where the Appellant asserts matters in reduction or mitigation of Respondent's claim or asserts matters which defeat a part of the damages claimed, the burden of proving such is on the Appellant. Mikol v. Vlahopoulas, 86 Ariz. 93, 340 P.2d 1000 (1959); Mass v. Board of Education of San Francisco Unified School District, 61 C.2d 612, 394 P.2d 579 (1964); Powell v. Brady, 30 Colo. App. 406, 496 P.2d 328 (1972); Burr v. Clark, 30 Wash.2d 149, 90 P.2d 769 (1948); Coble v. Osman, 83 Nev. 415, 433 P.2d 259 (1967); State ex rel Freeman v. Sierra County Board of Education,

49 N.M. 54, 157 P.2d 234 (1945); Pearson v. Sigmund, 503 P.2d 702, (Ore. 1972).

Appellant implicitly argues that the question of damages is a matter for the jury to decide. Respondent concedes that the amount of damages is ordinarily a question for the jury to decide. However, where the question of damages is not in dispute and there is no more than one reasonable inference that may be drawn therefrom, damages become a question of law for the court to decide. 25A CJS, Damages, Section 176(1). Having failed to pursue the question of mitigation of damages, Respondent submits that there were no contested facts as to the amount of damages which Respondent was entitled. recover. Therefore, the court correctly determined that the amount of Respondent's damages should be computed by the court.
Where facts are not in dispute and no more than one reasonable inference may be drawn therefrom, a question of law for the Court is presented. Eklund v. Metropolitan Life Insurance Co., 89 Utah 273, 57 P.2d 362 (1933); Wilcox v. Clouad, 88 Utah 503, 56 P.2d 1 (1936); See Roylance v. Davies, 18 Utah 2d 395, 424 P.2d 142 (1967).

CONCLUSION

A. The restrictive provisions of the Utah Governmental Immunity Act do not apply to actions brought against the state or political subdivisions arising out of contract nor do those provisions apply in the case of termination of tenured teachers.

B. The Respondent is entitled to monetary damages and an order reinstating him as a school teacher.

C. The language of Respondent's contract of employment with Appellant was not an issue as counsel for Appellant conceded the point in his representations to the jury and to the Court.

D. The lower court correctly decided that the question of damages was a question for the court to determine as there was no dispute regarding the amount of damages suffered by Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief were mailed, postage prepaid, to counsel for Appellant, Merlin R. Lybbert, 700 Continental Bank Building, Salt Lake City, Utah 84101, this ____ day of June, 1976.